

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

JAMES H. GORBEY, JR.,	:	CIVIL ACTION
ADMINISTRATOR OF THE ESTATE OF	:	
MARISSA ROSE FISHMAN, DECEASED	:	
	:	
v.	:	
	:	
RICHARD LONGWILL, BARBARA	:	
LONGWILL, AIR BASE CARPET	:	
MART, INC. d/b/a AIR BASE	:	
DISTRIBUTING, INC. d/b/a AIR BASE	:	
CARPET MART, ASHLAND	:	
CONSTRUCTION COMPANY, INC.,	:	
JOSEPH RIZZO & SONS	:	
CONSTRUCTION, VINCENT RIZZO	:	
CONSTRUCTION CO., INC. a/d/b/a	:	
ASHLAND CONSTRUCTION	:	
COMPANY, INC., JOSEPH V. RIZZO	:	
AND VINCENT RIZZO	:	NO. 05-211 KAJ

NOTICE OF MOTION

PLEASE TAKE NOTICE that the Motion of Defendants, Richard Longwill and Barbara Longwill, for Summary Judgment will be presented to the court at its convenience.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN**

By: /s/ Kevin J. Connors
Kevin J. Connors, Esquire
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Attorney for Defendants
Richard and Barbara Longwill

DATED: April 27, 2006

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**MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS,
RICHARD LONGWILL AND BARBARA LONGWILL**

Defendants, Richard Longwill and Barbara Longwill ("the Longwill defendants"), in their individual capacity, by and through their attorneys, Marshall, Dennehey, Warner, Coleman & Goggin, hereby submit the instant Motion for Summary Judgment and aver as follows:

1. The Longwill defendants are the grandparents of decedent, Marissa Fishman, who drowned in her grandparents' pool on August 20, 2002 in Wilmington, Delaware.

2. At the time of the accident, Marissa Fishman was approximately twenty months old and was visiting the home of the Longwill defendants with her mother and other siblings. The Longwill defendants' residence included a patio and an enclosed pool which was separated from the house by a sliding glass door.

3. On the date of the accident, contractors were working in the patio area. The sliding door was left open. Marissa Fishman was found in the pool after family members noted her absence.

4. Her mother started CPR, and responding paramedics continued CPR upon arrival and during transport to AI DuPont Hospital. Unfortunately, Marissa Fishman could not be revived, and she was pronounced dead approximately nine hours after being pulled from the pool.

5. The plaintiff, James H. Gorbey, Jr. ("plaintiff"), as administrator of the decedent's estate, filed the present action against the Longwill defendants and the contractors working at the Longwill defendants' residence on the date of the accident. Plaintiff alleges that the Longwill defendants are liable in negligence for the accidental drowning of their granddaughter, Marissa Fishman.

6. Under Delaware statute, the owner or occupier of private residential property cannot be held liable for injury occurring on the premises where the injured person is a "guest without payment," unless the injury was caused intentionally by the owner or occupier or was caused by the wilful or wanton disregard for the safety of others on the part of the owner or occupier. 25 Del. C. § 1501 (2005).

7. In the instant matter, the decedent, Marissa Fishman, was clearly a "guest without payment" within the meaning of section 1501. *See Dennis v. Dennis*, 2001 Del. Super. LEXIS 11 (Del. Super. Ct. Jan. 31, 2001).

8. Further, the Longwill defendants cannot be credibly characterized as having acted in a "wilful or wanton" manner where no evidence has been adduced to demonstrate that they

acted even negligently, much less willfully or wantonly. *See Bailey v. Pennington*, 406 A.2d 44 (Del. 1979).

9. Therefore, plaintiff is barred under Section 1501 from asserting any negligence claim against the Longwill defendants on the basis of the accident.

10. Summary judgment is appropriate where "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

11. As set forth in the paragraphs above and in the attached Brief in Support of the instant Motion, which is incorporated by reference herein, plaintiff's claims are barred by Delaware statute. Thus, no genuine issue as to any material fact exists, and summary judgment for the Longwill defendants must be entered as a matter of law.

WHEREFORE, defendants, Richard Longwill and Barbara Longwill, respectfully request that this Honorable Court grant the instant Motion and enter the attached Order granting summary judgment on all claims and cross-claims.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN**

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Attorney for Defendants
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CERTIFICATE OF SERVICE

I, Kevin J. Connors, Esquire, do hereby certify that on the 27th day of April, 2006, two copies of the foregoing Motion of Defendants, Richard Longwill and Barbara Longwill, for Summary Judgment were e-filed and delivered in the manner indicated to the following individual(s):

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**MARSHALL, DENNEHEY, WARNER,
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DATED: April 27, 2006

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